

1940

John Potter, David B. Potter, Jennie I. Potter, Sarah Potter Gibbs, Nettie Potter Miles, May Potter Stewart, Edith Potter Dewey v. Dr. W. H. Groves Latter-Day Saints Hospital : Abstract of Record

Utah Supreme Court

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Merrill C. Faux; Irvine, Skeen, Thurman & Miner; Attorneys for Defendant and Appellant;

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

JOHN POTTER, DAVID B. POT-
TER, JENNIE I. POTTER, SAR-
AH POTTER GIBBS, NETTIE
POTTER MILES, MAY POTTER
STEWART, EDITH POTTER
DEWEY,

and Respondents ^{Plaintiffs}
vs.

No. 6208

DR. W. H. GROVES LATTER-DAY
SAINTS HOSPITAL, a corpora-
tion,

and Appellant ^{Defendant.}

ABSTRACT OF RECORD

MERRILL C. FAUX and IRVINE,
SKEEN, THURMAN & MINER,
Attorneys for Defendant
and Appellant.

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STEWART, EDITH POTTER
DEWEY,

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Defendant.

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1

COMPLAINT

Comes now the plaintiff, John Potter, and
files this complaint on behalf of himself and of the
other plaintiffs herein who are made parties plain-
tiff by this complaint, and thereupon complains
and alleges:

1. That the defendant is a corporation organized and existing under and by virtue of the laws of the State of Utah with principal place of business at Salt Lake City, Utah.

2. That defendant is and at all times herein mentioned was operating and conducting a hospital in Salt Lake City engaged in the treatment, nursing and care of the general public for pay.

3. That the plaintiff John Potter is the surviving husband of Jean Brown Potter, deceased, and an heir of the said Jean Brown Potter, deceased; that the plaintiffs David B. Potter, Jennie I. Potter, Sarah Potter Gibbs, Nettie Potter Miles, May Potter Stewart, and Edith Potter Dewey, and each of them, are the surviving children of the said Jean Brown Potter, deceased, and they, and each of them, are heirs of the said Jean Brown Potter, deceased; that the above named plaintiffs are the sole heirs of the said Jean Brown Potter, deceased.

2 4. That on or about the 16th day of February, 1939, said Jean Brown Potter, deceased, entered and was admitted as a patient in said defendant hospital and said defendant hospital did then and there undertake to treat, nurse and care for said Jean Brown Potter, deceased, in return for a consideration paid or to be paid by or in behalf of said Jean Brown Potter, deceased.

5. That in operating and conducting said public hospital defendant owed a duty to Jean Brown Potter, deceased, and to plaintiffs to exercise due care in the treatment, nursing and care of the said Jean Brown Potter, deceased.

6. That contrary to its duty as above set out, defendant, by its agents and servants, carelessly and negligently, as more particularly hereinafter set out, allowed said Jean Brown Potter, deceased, to fall from bed and to suffer a broken hip as the result thereof, which fall and injury was the direct and proximate cause of the said Jean Brown Potter's death; that said fall and injury occurred on or about the 21st day of February, 1939, and that death occurred on or about the 23rd day of February, 1939.

7. That the said Jean Brown Potter, deceased, prior to said injury on said 21st day of February, 1939, and continuously after her entering and admission into said defendant hospital was nervous and at times irrational, and due and reasonable care required that the bed in which she was kept should be provided with sideboards to prevent said Jean Brown Potter, deceased, from falling out of said bed; and plaintiffs allege that prior to said 21st day of February, 1939, said defendant did so provide and maintain on said bed sideboards for the protection of said Jean Brown

Potter, deceased, but that said defendant on the night of said 21st day of February, 1939, did negligently and carelessly fail to provide for and place in position sideboards on said bed and negligently and carelessly failed to guard such bed and said Jean Brown Potter, deceased, so that by reason of said negligence and carelessness on the part of said defendant the said Jean Brown Potter, deceased did on said 21st day of February, 1939, fall out of the bed in which she was kept by defendant and as a result of said fall did suffer a broken hip and did as a result of said negligence and carelessness and said injury die on the 23rd day of February, 1939.

8. That the said Jean Brown Potter, deceased, was an attentive, affectionate and dutiful wife and a capable and efficient housewife to the plaintiff husband herein and that as a result of defendant's careless and negligent acts said plaintiff husband has been deprived of the company, comfort and services afforded him by the said Jean Brown Potter, deceased; that the said Jean Brown Potter, deceased, was a loving and affectionate mother to the plaintiff children herein, and to each of them, and that as a result of defendant's negligent and careless acts said plaintiff children, and each of them, have been deprived of the company and comfort of the said Jean Brown Potter, deceased; and plaintiffs further allege, by way of

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special damages, that they have been forced to expend, by reason of defendant's careless and negligent acts, the sum of two hundred and ninety (\$290.00) dollars for burial and funeral expenses for the said Jean Brown Potter, deceased; and that by reason and on account of the said acts of carelessness and negligence on the part of the defendant resulting in the death of the said Jean Brown Potter, deceased, as hereinbefore alleged, the plaintiffs have suffered general damage in the sum of ten thousand (\$10,000.00) dollars.

WHEREFORE, plaintiffs pray judgment against the defendant in the sum of ten thousand two hundred ninety (\$10,290.00) dollars and for the costs of this action.

LEWIS and LEWIS,

Attorneys for Plaintiffs.

4 Verified.

Filed March 30, 1939.

9 (TITLE OF COURT AND CAUSE)

DEMURRER

Comes now the defendant above named and demurs to plaintiffs' complaint on file herein and for grounds of demurrer alleges that said com-

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plaint does not state facts sufficient to constitute a cause of action.

Dated this 19th day of April, 1939.

M. C. FAUX and
IRVINE, SKEEN & THURMAN,
Attorneys for Defendant.

I, Sam D. Thurman, one of the attorneys for the defendant, do hereby certify that the above and foregoing demurrer is filed in good faith and not for the purposes of delay.

SAM D. THURMAN.

Filed April 22, 1939.

11 Entered order overruling Defendant's Demurrer.

18 (TITLE OF COURT AND CAUSE)

AMENDED ANSWER

Comes now the above named defendant, and, by leave of Court first had and obtained, files this Amended Answer, and by way of answer to plaintiffs' complaint on file herein, admits, denies and alleges as follows:

1. Admits paragraph 1 of said complaint.

2. Admits paragraph 2 of said complaint.

3. Answering paragraph 3 of said complaint, defendant alleges that it is without information sufficient to enable it to form a belief as to the allegations therein contained, and, on that ground, denies the same.

4. Admits paragraph 4 of said complaint, except as hereinafter qualified.

5. Admits paragraph 5 of said complaint.

6. Answering paragraph 6 of said complaint, defendant admits that on or about February 21, 1939, said deceased sustained a fall, resulting in certain injuries, while she was a patient in defendant's hospital, and that she died on or about February 23, 1939. Further answering said paragraph, defendant denies each and every allegation therein contained, and not herein specifically admitted.

19 7. Answering paragraph 7 of said complaint, defendant admits that said deceased suffered certain physical injuries on or about February 21, 1939, and that she died on or about February 23, 1939. Further answering said paragraph, defendant denies each and every allegation therein contained, and not herein specifically admitted.

8. Answering paragraph 8 of said complaint, defendant denies that plaintiffs, by reason of any act or failure to act on the part of defendant, suffered damages in the amounts set forth in said paragraph, or in any other amount or amounts whatsoever.

9. Further answering said complaint, defendant denies each and every allegation therein contained, and not herein specifically admitted.

Further answering plaintiffs' complaint, and as an affirmative defense thereto, defendant alleges:

(a) That at all times mentioned in said complaint, the Church of Jesus Christ of Latter Day Saints has been and now is an unincorporated association, engaged in operating and maintaining hospitals, and, in said hospitals, in caring for and treating, without compensation, the indigent sick and injured members of said Church, and also engaged in promulgating and teaching generally the principles and tenets accepted and adopted by said Church; that in the carrying out of its purpose and object of operating and maintaining hospitals, the members and officers of said Church have caused corporations, similar to the defendant corporation, to be incorporated throughout the State of Utah and elsewhere, and that in the carrying out of its general purposes and objects,

said members and officers have also caused other corporations sole, similar to the Price First Corporation of the Church of Jesus Christ of Latter Day Saints, to which reference is hereinafter made, to be incorporated throughout the State of Utah and elsewhere, each of which said other
20 corporations exercises local ecclesiastical jurisdiction over a given territory, commonly known and designated as an "Ecclesiastical Ward."

(b) That at all times mentioned in said complaint the defendant has been and now is a corporation, organized and existing under and by virtue of the laws of the State of Utah, and engaged in operating and maintaining a general hospital in Salt Lake City, Utah, and that during all of said time, the defendant has been and now is a non-profit and non-stock corporation owned wholly and solely by said Church as an institution and not through any stock ownership, and has been and now is operated and maintained, in part, by contributions, donations and payments made by said Church and by said other corporations sole exercising local jurisdiction, as aforesaid. That all of said contributions, donations and payments have been and now are derived from voluntary gifts made by the individual members of said Church.

(c) That at all times mentioned in said complaint, the Price First Corporation of the Church

of Jesus Christ of Latter Day Saints has been and now is a corporation sole, organized and existing under and by virtue of the laws of the State of Utah, and exercising ecclesiastical jurisdiction over what has been and now is known as the "First Ward of Price," and that during all of said time said Price First Corporation has been and now is a non-profit and non-stock corporation, owned wholly and solely by said Church as an institution and not through any stock ownership, and among other things, has been and now is engaged, with other similar corporations sole also exercising ecclesiastical jurisdiction in the various localities throughout the State of Utah and elsewhere, in collecting voluntary offerings and gifts from the members of said Church residing in their respective localities, the proceeds of which said offerings and gifts, in part, have been and now are donated to the defendant corporation and used by it in meeting the expense incident to the care and

21 hospitalization of the indigent sick and injured members of said Church in said localities; that in the event said offerings and gifts were insufficient to defray said expense, it has been and now is the practice and custom of said Church to pay, from its central and general fund, the amount of such deficiency, and that in the event said offerings and gifts were in excess of the amount necessary to defray said expense, it has been and now is the practice and custom of said Price First Corporation,

and said other corporations sole exercising similar jurisdiction, to pay the amount of said excess into the central and general fund of said Church. That in making said contributions, donations and payments to the defendant corporation, said Church and said Price First Corporation, together with said other similar corporations sole, act only as conduits by and through which the voluntary offerings and gifts of the individual members of said Church are conveyed to the defendant corporation.

(d) That on and prior to February 16, 1939, Jean Brown Potter, the deceased named in plaintiff's complaint, was an indigent person and a member of said First Ward of Price; that on February 16, 1939, said deceased, as a charity patient, and not otherwise, was admitted into the hospital maintained and operated by the defendant corporation as aforesaid, and that thereupon said Price First Corporation, in furtherance of its practice and custom to assist in the maintenance of said hospital, assumed to and did contribute to the defendant corporation, from said voluntary offerings and gifts; that thereafter the defendant corporation, without compensation, rendered hospital and medical services for said deceased to and including the date of her death, which occurred on February 23, 1939; that in performing said hospital and medical services, with-

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out compensation as aforesaid, the defendant corporation acted as and was a charitable institution and was exempt from liability for the negligent acts of its employees, agents and servants, and that if said deceased suffered injuries, resulting in her death, as alleged in said complaint, or at
22 all, by reason of the negligent acts of any of its employees, agents or servants, which the defendant corporation denies, the defendant corporation nevertheless is not liable for damages resulting from said alleged negligence and said death.

WHEREFORE, defendant prays that plaintiffs' complaint be dismissed, and that defendant recover its costs incurred in defending this action.

MERRILL C. FAUX and
IRVINE, SKEEN & THURMAN,
Attorneys for Defendant.

Verified.

Filed June 7, 1939.

BILL OF EXCEPTIONS

72-4 (It was stipulated by plaintiffs that the allegations of sub-paragraph (a) of paragraph 9 of defendant's amended answer, may be deemed admitted, except for the allegation that the care and treatment afforded by the Church of Jesus Christ of Latter Day Saints, in operating and maintaining hospitals, was "without compensation." Such

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allegation, “without compensation,” under plaintiff’s stipulation, is to be deemed denied.)

75 (It was also stipulated by plaintiffs that the allegations of sub-paragraph (b) of paragraph 9 of defendant’s amended answer, may be deemed admitted.

75-83 (It was also stipulated by plaintiffs that the allegations of sub-paragraph (c) of paragraph 9 of defendant’s amended answer, may be deemed admitted, with the qualification that the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints may call upon the Bishops of the local wards having patients hospitalized in the defendant hospital, to contribute their pro rata share of the expenses incurred for said hospitalization; that when so called upon the local wards attempt to encourage their members to make sufficient donations for said purposes; and that the Presiding Bishopric of said Church, in the event such funds are insufficient to cover the expenses of said hospital, meets said deficit by drawing on the general funds of said Church.)

84-88 (As to the allegations of sub-paragraph (d) of paragraph 9 of defendant’s amended answer, plaintiff also stipulated (Trans. p. 87) that when deceased entered the defendant hospital there was no charge entered or made by the hospital to the deceased, or to any member of her immediate

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family; that no amount has ever been paid to the hospital for deceased's care and maintenance, and that no amount has been paid to the Price First Ward, which has been earmarked or designated to go to the hospital for deceased's care and maintenance.)

89-90 (It was also stipulated by the parties that if Mr. Harold Barnes, superintendent of the defendant hospital, were present, he would testify as follows: that it is the custom of the defendant hospital, when a patient is received in the hospital, to make a record of the entrance of that patient in the expense records of the hospital; that from day to day, as services are rendered, the customary charge is made and charged against the patient's record; that the amount of that charge is dependent upon the amount and type of service and the room furnished; that at the end of the service the complete charge is made and that in the instant case the total charge made against the deceased was \$55.30; that since the date of deceased's death the defendant hospital has received a contribution from the Price First Ward, of which Ward deceased was a member, of \$10.00 only; that the hospital record, marked plaintiffs' Exhibit A, is the hospital record of deceased during the period of her hospitalization in the defendant hospital.)

93 (Thereupon, defendant's original answer was

offered by plaintiff, and, by the Court, received in evidence.)

TESTIMONY

95 Jennie I. Potter, a witness called by plaintiff, testified as follows:

Direct Examination.

I am a daughter of John Potter and Jean Brown Potter, the deceased. At the time my mother died, she left surviving her, John Potter, her husband, and the following children: David B. Potter, Jennie I. Potter, Sarah Potter Gibbs, Nettie Potter Miles, Mary Potter Stewart and Edith Potter Dewey. She left no other children or grandchildren. All of the survivors are over the age of 21 years, and are alive today. Last February my mother was a patient in the defendant hospital. She entered during the evening of February 16. After she was placed in a bed, they (the hospital) put a large board, about 12 inches wide, around the side of the bed. It was fastened to the bed, at the foot and at the head, with ropes. The bed was against the wall and the board was put on the outside only. It stood about six or eight inches above the mattress.

98 “Q. Now, on that night, do you know whether or not there was a nurse, special nurse, designated to attend your mother?

MR. THURMAN: I object to that as incompetent, immaterial, * * * The cause of action is not grounded upon the absence or presence of a nurse.

THE COURT: The objection will be overruled."

There was no special nurse in attendance on the first night; just the regular nurses were on duty.

"Q. Did you at a later time employ a special nurse?

99

MR. THURMAN: * * * I object to that as incompetent, irrelevant and immaterial, for the same reasons, that this action is not grounded upon the failure, or the presence or absence of a special nurse, or a nurse. It is grounded entirely upon other matters, and consequently the employment or non-employment or presence or absence of the special nurse would be irrelevant and immaterial.

100

THE COURT: The objection will be overruled.

We employed a special nurse the day after mother went to the hospital.

“Q. Now you say you employed a special nurse. How did you do that?

MR. THURMAN. We object to that as incompetent, irrelevant and immaterial.

THE COURT: The objection will be overruled.

101 We took it up with the superintendent of nurses and asked her to get us a special nurse for Friday night, and we made the payment direct to the special nurse. We had nothing to do with the selection of the nurse; she was selected by the superintendent of nurses. The special nurse remained Friday, Saturday and Sunday nights.

105 Miss Larson told me that she would arrange to have the services of the special nurse discontinued. The special nurse was not in attendance at all on Monday night.

106 From the time mother went to the hospital to and including the following Monday, I observed that she was quite nervous and at times became irrational. She seemed to have crazy ideas and thought she was some place else.

107 Mother thought she was being moved into different hotel rooms. She thought she was in a beautiful room when they moved her to a room at the

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front of the hospital. She liked the view and she couldn't get it out of her head. She would say to us, "See this beautiful new room in the hotel they moved me in." The next time she would say, "Oh, I don't like this room in this hotel." On another occasion she said, "Oh, I thought we were down in Kress' shopping."

- 108 Mother died on February 23. I was present
when Dr. Gill Richards and Dr. Llewellyn were
making an examination of her. That would be on
Wednesday morning, February 22. Dr. Gill Rich-
109 ards and Dr. John R. Llewellyn were attending my
mother; I did not employ them. I heard a conver-
110 sation between Dr. Richards and Dr. Llewellyn at
the hospital while they were making an examina-
tion of my mother on Wednesday, the 22nd day of
February.

"Q. State the conversation?

MR. THURMAN: I object to that as hearsay, incompetent and irrelevant, no foundation having been laid.

THE COURT: The objections will be overruled."

Dr. Richards said that one of her lungs was filled with pneumonia, which was a direct result of her fall out of bed. Dr. Llewellyn agreed, and

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they just went on with their examination. This would be the day before mother died.

111 “Q. Did they say at that time anything about any injuries to your mother?

 “A. Yes, they told us about a fractured hip from falling out of bed, and they said they couldn’t do anything.

 MR. THURMAN: Just a moment, I move that that be stricken on the grounds that it is irrelevant and immaterial and hearsay and twice removed. They talked about falling out of bed.

112 THE COURT: The motion to strike will be denied.”

My mother would have been 72 years old on April 13 of this year, and my father and she were living together as husband and wife.

113 “Q. What was the relationship between your father and mother so far as being affectionate to each other?

 MR. THURMAN: I object to that as incompetent, irrelevant and immaterial, not tending to prove any element of damage which the law will recognize.

THE COURT: The objection will be overruled."

They have been married for 53 years and have always been very happy together.

113 "Q. And as to companionship?

MR. THURMAN: The same objection.

THE COURT: The objection will be overruled."

They were always together and worked together in everything; there was no disharmony in our home at all.

"Q. And what had been the conduct and attitude of your mother toward her children?

Q. Throughout her life and continuing up until the time of her death?

114 MR. THURMAN: May we have the same objection?

MR. LEWIS. Yes.

THE COURT: The objection will be overruled.

A. Well, she was the grandest mother in the world, I think, and she had always been just grand to us. She has worked with us at all times and helped us in everything we have had to do and stood by us in everything we have gone through.

MR. THURMAN: Now, may we move to strike the answer as wholly incompetent, irrelevant and immaterial to any issue of damages in this case.

THE COURT: The motion will be denied."

115 We paid \$190.00 for the undertaker, which included the casket and there was \$33.00 for the burial lot and dedicating the grave. There was \$15.00 to the Wallace Mortuary in Price for meeting the train and taking care of the funeral and then there were other nurses that we had to have after, that is, after the fall. We had two special nurses then.

"Q. What, if anything did you do by way of special nurses after the injury to your mother?

MR. THURMAN: I object to that as immaterial and not within the pleadings.

THE COURT: The objection will be overruled."

There were three shifts of special nurses, at \$5.00 each shift; that would be \$15.00.

“Q. Was there anything paid for burial clothing?

MR. THURMAN: Same objection.

A. Yes, \$20.00.

MR. THURMAN: Just a moment. Same objection, incompetent, irrelevant and immaterial, and not within the pleadings.

THE COURT: The objection will be overruled.

CROSS EXAMINATION

116 I was 32 years old last April and formerly lived at Price. I moved from Price three years ago this July and came to Salt Lake City, where I have been living ever since. When I left for Salt Lake City, my father and mother were living in Price. My father was 77 years old last December; my brother, David B. Potter, is 41 years old; I am 32 years old; my sister, Sarah Potter Gibbs, is 49 years old, and my sister, Nettie Potter Miles, is 36 years old; my sister, May Potter Stewart, is 47 years old; and my sister, Edith Potter Dewey, is 45 years old. I am the youngest in the family. My sister, Edith Potter Dewey, is a widow. My father

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still lives at Price. My brother, David B. Potter, resides in Salt Lake City, he having left the home of my parents in 1922, at the time of his marriage. I left the home in 1936, and have been living away ever since. Before leaving Price I worked for the State Road Commission in that city. Before that I taught school and lived away from home. I started teaching school in 1925. That was my first employment outside of the home. Since that time I was married for two years and did not work. The first year I taught school I came home either every night or on week ends. The next year I
119 taught in Price and lived at home. Since 1936 I
120 have gone home on holidays. My sister, Sarah Potter Gibbs, left the home of my parents when she was 18; that would be 31 years ago. She has lived right next door to my parents in Price. My sister, Nettie Potter Miles, got married in 1923 and has maintained a separate home in Price since that time.

My sister, May Potter Stewart, who is now 47 years old, got married about 26 years ago, and has maintained a separate home since then in Brigham City, Utah.

121 My sister, Mrs. Dewey, is a widow. She was married about 22 years ago and resides in Los Angeles. She has lived out of the state most of the time. My father and mother maintained their

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residence in Price for the last 32 or 33 years, and they have always kept their home up so that we could have a place to go to.

Mother and father came to Salt Lake City on October 15, 1938, and my mother remained there until the time of her death, in February, 1939. Before she went to the hospital, she resided at the Little Hotel in Salt Lake City. My father was with her at the hotel. He has not worked for quite a long time. The purpose of my parents coming to Salt Lake City was because of the illness of my father. He had heard about a doctor in Salt Lake City who, it was thought, might give him some relief. My mother was not strong; she had heart trouble last summer, a year ago now. Her first heart ailment was in May, 1938, and at that time she was residing in Price. Dr. John Hubbard was her physician.

124 My mother has done her work ever since I was born. May, 1938, was the first time when we had to have a doctor for her and have her in bed. She remained in bed about three weeks, and thereafter took things easier. When she came to Salt Lake City, she also took things easier; this was made necessary because of her heart condition. After May, 1938, my mother didn't keep house, except for doing little odd jobs. After October, 1938, my mother kept care of my father's clothes, seeing to

it that he was fed and dressed. In Salt Lake City they went out for their meals, and she had to see to it that father got his meals, because he was quite helpless. At the present time my brother is in Salt Lake City, two of my sisters are in Price, one in Brigham City and one in Los Angeles.

127 After burying my mother, my father came and lived with me in Salt Lake City for two weeks. He then went to Brigham City to stay with my sister, and later to California where he stayed with my other sister for a month. At the present time he is staying with my sister, Sarah Potter Gibbs.

128 On the night I took my mother to the hospital, he and my mother were living at the Little Hotel. She was taken from the hotel to the hospital in an ambulance. She had a heart attack on January 31, 1939, and was thereafter confined to her bed in the Little Hotel. During that period of time she had to be waited on. From October, 1938, to the time of this heart attack she was out every day, but took things rather easy. Dr. Jack called on her on January 31, 1939, and attended her until she went to the hospital.

129 I paid the special nurses myself; both father and mother were without means for that purpose.

130 I have tried to help in supporting mother. She has been receiving a pension of \$24.00 a month.

- I haven't been paying her any definite sum. When she needed clothes, I bought them for her. During the past year I have not contributed very much; just presents and gifts; I haven't given anything regularly. My father also got a pension of \$17.00 a month. While they were at home they were always saving what they didn't need, and they used that money here in Salt Lake City. When they needed extra money I gave it to them. My brother would also give them a gift when he thought they needed it. My brother didn't contribute very much. Sometimes he would go up there and give them a dollar or two when he thought they needed a little extra money. It wouldn't amount to very much each month. My sister, Sarah Potter Gibbs, 132 did not contribute anything. Neither did my sister, Nettie Potter Miles, contribute to their support. While my parents were in Price Mrs. Miles would help mother around the home. She would help her with her housework. My sister, May Potter Stewart, contributed just about the same as my brother; just a few dollars. My sister, Edith Potter Dewey, who lives in Los Angeles, contributed very little. Mrs. Gibbs, my sister living in Price, would also help mother with the housework.
- 133 During the past year practically all of us children have been contributing some little money to the support and maintenance of our mother. In addition to that the children who were living in the

same community with mother would contribute their services in helping her with the housework.

The nurse rode up to the hospital in the ambulance with mother, and my brother and father went in one car and I in another car. We had a nurse employed to take care of mother at the Little Hotel. The nurse was at the hotel for about a week and four days. Mother went to the hospital on Thursday, February 16. I donated to my mother the expense of the nurse at the hotel.

- 135 Mother paid nothing to the hospital for the services there; neither did the children pay anything to the hospital for that service. There was a sideboard on mother's bed when I left Thursday night. When I arrived at the hospital Friday morning they had dropped the board down. I reached the hospital a little before 8:00 that morning, and the board remained down while I was there. I again visited the hospital during my lunch hour on Friday. There was no special nurse at that time. After finishing my work at 5:00 Friday afternoon, I returned to the hospital, staying there until supper time, then leaving and going right back again. I stayed there Friday evening until after visiting hours—a little after 8:00 o'clock. My father was with me while I was there. It was my understanding that the special nurse would come on at about 10:00 or 11:00. I person-

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ally paid the nurse for her services; that was a contribution I made to the care of my mother.

My sister from Price, Nettie Miles, came in Friday night and we went to the hospital together Saturday morning before eight o'clock. I stayed there until I had to go to work and my sister stayed up most of the morning.

139 I next saw my mother at 2:00 Saturday afternoon, staying with her until sometime between 4:00 and 5:00 o'clock. I went back to see her again at 6:00 o'clock, staying with her during the visiting hours. On Sunday Mrs. Miles and I went to the hospital at 10:00 o'clock, remaining there until around noon. We were all at the hospital in the afternoon. The special nurse was on duty Friday, Saturday and Sunday nights—that would be the 17th, 18th and 19th. For this special service I personally paid the regular charge of \$5.00 a day. The nurse would come on at 10 or 11 o'clock at night and leave the next morning before I arrived at the hospital. I never saw her, but talked with her over the 'phone.

141 My visits to the hospital on Monday were about the same. Some time during the day I had a talk with Miss Larson; the conversation took place some time after my work that night. In the conversation Miss Larson expressed the opinion

that mother was doing so well that we might well obviate the expense of a special nurse. The accident to mother happened on the early morning of Tuesday; that is, shortly after Monday midnight. On Monday my mother was in room 437; that would be on the fourth floor. That would be what they call a ward, and there was another lady (Mrs. Kearney) in the room with her. A third bed in the room was empty.

144 They would only let one member of the family stay in the room at a time. This was so even during visiting hours. We couldn't stay during the night. They insisted that we sit in the hall; they wouldn't let us stay in the room with mother. Before the accident, the doctors told us we could stay all night, but the nurses wouldn't let us.

146 Miss Larson told us our mother was making some improvement on Monday night. We wanted to avoid the expense of a special nurse if it wasn't necessary. Miss Larson gave it as her opinion that mother was improving, and that seemed apparent from our observations. I have no separate and independent means and have a son to support.

I didn't understand that Dr. Gill Richards and Dr. Llewellyn, or either of them, were in the room when mother had the accident. No

doctor was present when the accident occurred. The bed which mother occupied was the adjustable type; you could raise the mattress either
147 at the foot or at the head of the bed. In mother's case, the mattress was raised at the head to a little lower than a forty-five degree angle, about thirty degrees. Because of her heart ailment, it was my understanding that this was the proper position. Whenever I visited her, she was in that position. On Thursday night they
148 put a sideboard on her bed. That would be the night she went to the hospital. The board protruded above the mattress about five or six inches. The board was always at the corner by the bed, but was not fastened after Thursday night. The board was standing upright in the corner of the room and I only saw it fastened
148 to the bed once. Friday morning when I called at the hospital the board had been dropped down so that the top of the board was below the mattress; in fact, I believe the board was practically off the bed Friday morning. Thereafter, I saw the board in the room but it was never in position on the bed. It was just an ordinary board with holes to accommodate the ropes. I saw but one board in the room. I believe they put the sideboards on Mrs. Kearney's bed instead of mother's bed. In any event, the sideboard was on
151 mother's bed but once. My mother was paying

the Little Hotel \$22.50 a month. Neither my father nor mother was a big eater, and I know they didn't eat very much. Mother was thin and weighed between 100 and 105 pounds. Years ago she was considerably heavier than that. Her greatest weight was 145 pounds. She had been getting thinner for a couple of years. When she started to go down two years ago she weighed probably between 120 and 130.

152

Re-Direct Examination

The bed at the hospital was the ordinary type used in hospitals. It was adjustable both at the head and at the foot. The bed stood about four feet off the floor, considerably higher than the ordinary sleeping bed in the home. It would be three feet or forty inches wide; it might be four feet. The head of the bed and the foot of the bed extended above the mattress.

154

My husband and I were divorced, and he died afterwards.

Mrs. Kearney occupied the same ward with my mother on the nights of February 20 and 21. They moved mother on Wednesday. Mrs. Kearney died about twelve hours after my mother's death.

Re-Cross Examination

The table I am standing by would be about thirty inches high. The height of the bed would be about twelve or fourteen inches higher than the table. The height I have given would be to the top of the mattress. Mother went into the hospital on Thursday night and I made daily calls in the daytime on four separate days. I was at the hospital at least three times on Friday, Saturday, Sunday, and Monday, and mother sustained the accident early Tuesday morning. When I visited mother, which was always in the day time, the board was not in place, and at no time was there a special nurse on duty during the days of Friday, Saturday, Sunday, and Monday. The only time we employed a special nurse was beginning at ten or eleven o'clock on Friday, Saturday, and Sunday nights. These three nights were before the accident. After the accident we again employed someone to care for mother.

158 It was on Tuesday night that I first saw the nurse employed by us. When I called at the hospital during the first days, it was always after the special nurse had left. At all times, however, there were nurses present who were connected with the hospital.

Re-Direct Examination

In addition to my being at the hospital, other

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members of the family also went there. My father went up early Friday morning and sat in the hall most of the time. My other sisters took turns staying there.

166 JOHN ZENGER, a witness produced on behalf of the Plaintiff, testified as follows:

Direct Examination

I am Assistant Superintendent of the defendant Hospital. Dr. Gill Richards is on the medical staff of the hospital, likewise Dr. Llewellyn. Dr. Richards was assigned by the hospital as the attending physician for Mrs. Jean Potter, and thereafter acted in such capacity. I am not sure about Dr. Llewellyn. At the time of the hospitalization, Dr. Richards was the senior man on the medical staff and he would have the right to call in Dr. Llewellyn for consultation. Dr. Richards acted in that capacity during the whole of the time Mrs. Potter was in the hospital, and attended the patient as often as it was deemed proper or necessary. Internes were also available. Dr. Richards was not selected by the patient, but was assigned by the hospital.

Cross-Examination

By Mr. Thurman.

168 Dr. Richards was assigned to the case at the

instance of the hospital. It was just the usual procedure in charity cases. The attending staff physicians take their turn in serving on that service. When I say "charity case" I mean that neither Mrs. Potter nor her family paid anything direct to the hospital; neither did Dr. Richards, or the staff, receive any compensation either from the hospital or from any one of the family of the patient.

170

Re-Direct Examination

Dr. Richards rendered his service by reason of his connection with the hospital as a member of the staff. The members have a voice in the direction of the affairs; that is the extent of their privilege. Doctors who are not members have no such voice.

171

Re-Cross Examination

Doctors who are not members, however, are free to go into the hospital and practice. This privilege is extended to every licensed physician, and he may take his patients into the hospital quite the same as a staff member.

182-3

(Thereupon, "Exhibit A," being the hospital record and chart of Mrs. Jean Potter, was offered in evidence by Defendant on cross-examination, and was received in evidence by the Court).

184 Plaintiff rested.

184-6 (Thereupon, the Defendant moved the Court to grant a non-suit on the following grounds:

1. That there is no evidence, a complete want of evidence to show that the defendant omitted to do any one of the things on which the cause of action asserted by plaintiffs is grounded;

2. That there is a want of evidence to establish that any act on the part of the defendant, or any omission to act on its part, as alleged in the complaint, or at all, constituted carelessness or negligence;

3. That there is an utter lack of evidence to establish that the defendant in the exercise of the care and duty which it owed to the deceased, was required to maintain and keep in place sideboards on the hospital bed occupied by the deceased;

4. That there is a want of evidence, a complete lack of evidence to establish that failure to maintain sideboards on the hospital bed was the proximate cause of the injuries sustained by the deceased;

5. That there is a lack of evidence, complete lack of evidence to establish that the death of the deceased resulted from the accident which she sustained wherein she received a fracture in the left femur;

6. That there is a want of evidence to show that the defendant was required, in the exercise of the duty and care which it owed to the deceased, was required to maintain in place sideboards at the time of the accident wherein the deceased sustained a fracture to her left femur;

7. That there is a want of evidence to establish that at the time of the accident to the deceased resulting in a fracture to her left femur, that at that time there was any requirement on the part of the defendant, any reason to believe on the part of the defendant that sideboards were necessary in the proper caring of the deceased and discharging the duty which the hospital owed the deceased under the circumstances;

8. Furthermore, that the evidence shows that the deceased, nor anyone for or in her behalf, paid no compensation to the hospital for the hospitalization of the deceased, under which circumstances

the deceased became and was a charity patient, and that in caring for the deceased during the time in question, the defendant was a charitable institution, and under such circumstances was exempt from liability for the acts of its employees and servants, whether negligent or otherwise, and that the defendant corporation, in view of the testimony offered and received in this case would only be liable in the event plaintiffs established that the defendant had been negligent in the selection of its servants and employees, and that the evidence in this case fails to show that there was any negligence in such selection.

On those grounds we think we are entitled to a non-suit. The court has in mind the pleadings in this case. The sole act of negligence is that we failed to maintain a sideboard on this bed.

THE COURT: The motion for non-suit will be denied.

189 NEOMA MASON, a witness produced on behalf of the Defendant, testified as follows:

Direct Examination

I have resided in Salt Lake City since my

birth, and graduated as a nurse from the L. D. S. Hospital in 1923. I received my Certificate from the State of Utah in June, 1923. Immediately thereafter, I went to Chicago and took post-graduate work in the Chicago Lying-In Hospital. I had experience in cases where the patient was delirious and during both the waking hours and sleeping hours of the patient.

- 191 I saw no sideboards used in the Chicago hospital. At the end of four months I returned to Utah, where I practiced my profession as a supervisor of obstetrics in the L. D. S. Hospital. My six years were spent entirely in the obstetrical division and I do not recall any occasion for the use of sideboards.

In 1929 I went to Boston, where I took more post-graduate work in the Children's Hospital connected with Harvard University. I came back to Utah in March, 1930. I have been continuously employed in the L. D. S. Hospital since 1934. At first I was assistant head nurse on ward 4-B, which is a medical division in that department. Ward 4-B is the one involved in this case. After 1935 I was head nurse in the same department, that is, on Ward 4-B. On the following fall, I became supervisor over the entire medical department, and I am still serving in that capacity.

Altogether, there are two medical supervisors. It is my duty to visit all of the patients and I do so daily if time permits. In my particular division there were approximately 104 beds, some are in private rooms and some are in wards. In my experience I have seen the use of sideboards and have observed cases where sideboards were used, and where sideboards were not used. I am familiar with the type of cases where sideboards are used.

- 196 The sideboards are fastened to the bed by means of a rope. The board protrudes above the mattress, I would say, a foot. I have seen cases where sideboards were used and where the patient had gone over the top and out of bed. This happens quite frequently. We use sideboards in cases where the patients are unconscious, and where they might become restless.
- 197 Where a patient is not restless and where the patient is awake and not unconscious, we ordinarily do not use sideboards. Sideboards are not used in all hospital cases for the reason that to do so would make the patient very uncomfortable. They would object to that sort of therapy. We have had patients object very much to the use of sideboards. A great many of them feel as they do in oxygen tents, that they are crowded; some complain like they would in a dark closet, and they want to get out,

and it makes them more restless. It is our duty to try and relieve patients from restlessness; to do so promotes the healing processes.

- 198 I remember a patient by the name of Mrs. Jean Brown Potter. She was first put on division 2-A; that is part of my division, and she was put in room 203, a four-bed ward. That was the room to which she was assigned when she entered the hospital. Later, she was transferred to room 437 of ward 4-B. There were three bed in this ward. I received a report that she had been very noisy while in 2-A and she had to be taken to the sun porch, because at that particular time we had several very ill patients in the same room with Mrs. Potter, and they needed their rest. Mrs. Potter came to room 203 on Thursday night, and was transferred to 4-B on Sunday morning. Up to Sunday, I had one day off, but other than that saw her every day. I saw Mrs. Potter for the first time on Friday morning; she was very restless most of the time. On Saturday I was absent from the hospital and next saw her on Sunday morning, and I noticed a great deal of change in her condition. I also saw her on Monday morning and was required to be in her room on that day frequently in order to help with Mrs. Kearney, who was a very sick patient, suffering from rheumatism of the joints. I observed Mrs. Potter par-

ticularly on Monday because she seemed more restful and to enjoy the association with Mrs. Kearney. Mrs. Potter was conscious. I left the hospital on Monday around 4 or 5 o'clock. In the afternoon of that day, I made my rounds and observed that Mrs. Potter was resting. When I saw Mrs. Potter she was sitting up in bed at a forty-five degree angle.

203 I never saw her in any other position in bed. Mrs. Kearney was also in a sitting posture. She was a cardiac or decompensated case that usually stay awake. Mrs. Kearney was sitting straight up.

204 When I made the rounds on Monday afternoon, Mrs. Potter was in bed in the position that I have heretofore stated. Her condition was still critical, but she was resting and free from restlessness. She appeared to be rational and from the reports I received, she and Mrs. Kearney had really enjoyed themselves a great deal that afternoon in their conversations with each other. I never saw sideboards on the bed of Mrs. Potter, and I saw her every day with the exception of Saturday.

205 It is part of my duty to examine the hospital charts and I did in the case of Mrs. Potter. In order to familiarize myself with her condi-

tion, I got reports of the nurses every morning and evening as I made the rounds. Mrs. Potter had been very restless at the time the sideboards were used, and I received the report that they had to take her out of the oxygen tent because she fought the oxygen. When she came in the hospital she was cyanotic. After she was transferred to 4-B she seemed to be more comfortable in that environment, and I do not feel her condition on Monday indicated that sideboards should be used. Mrs. Kearney was actually as ill a patient as Mrs. Potter and she didn't have sideboards. Nothing came to me from my observations, or as a result of conversation with the nurses, which indicated that sideboards were necessary for Mrs. Potter.

207

Cross-Examination

I didn't state that for some years after I graduated in 1923, I had never seen sideboards at the L. D. S. Hospital. In the children's ward, some of the beds are provided with sides that can be folded up and locked at each end, or lifted up vertically. It serves as a cradle. This is not true of the full-sized hospital beds. I visited other hospitals in Salt Lake City and have never observed sideboards on the regular hospital beds.

209 Hospitals do have special beds provided with a type of arrangement that fits on specially, and

these are used sometimes when, in the judgment of the hospital authorities, it would be proper to use them.

My hours at the hospital were from 7 a. m. to 4 in the afternoon. I do not recall of observing on the record, Monday afternoon, a notice to the effect that Mrs. Potter was very much confused. I did observe that at 3 o'clock there was an entry stating that she was "very much confused." I also observed a later entry to the effect that she had a smothering sensation and had slept considerable. I saw her in the morning of Monday, between 7 a. m. and noon, and she was resting very comfortably. My hours would be from 7 in the morning to 4, and during those hours I never saw any sideboards in place on Mrs. Kearney's bed.

On Monday, I was in the ward and was seeing all the patients, but I had a particular problem when I was in Mrs. Kearney's room at that time, to help one of the student nurses. For that reason I devoted considerable of my time while in that room to the attention of Mrs. Kearney. I do not recall any conversation between Mrs. Potter and Mrs. Kearney. I made the statement that I received the report in the afternoon from the head nurse on that division that Mrs. Potter had been very much more comfortable and had enjoyed the

- association of Mrs. Kearney. This was an oral report that I received when I made the rounds.
- 212 The other report I received was that Mrs. Potter was very restless and fought the oxygen tent; that is, she would resist the application of it although it was designed to make her breathing more comfortable. Mrs. Potter was restless most of the time on Friday, and the nurses on the floor commented upon that fact. I said that it was the practice to put sideboards on all unconscious patients, but not on all restless cases. We try to use the best judgment for the type of case. We often put the boards upon restless patients to begin with to see how the treatment affects them.

213

Re-Direct Examination

We experiment very many times by putting sideboards on patients who are restless; if we find they fight or resist those boards, we do not consider it good practice to leave the boards there. It is more dangerous if the boards are left there and the patients crawl over the boards and fall at that height than it is for patients to just get their feet out of bed and falling. But where the patients are unconscious, and where there is indication of restlessness, then we feel the boards are proper, and we use them. On Friday, Mrs. Potter was restless and it was felt it was best not to use a sideboard in her case. An oxygen tent is a tent

made of oiled silk; the patient is enclosed in it and the rubber oil silk, or skirt as we call it, is tucked under the bed so there will be no escape of oxygen. The head, chest, and arms of the patient are covered by the tent. The tent extends at about three feet above the face of the patient and is about the width of the bed. All patients are not calm and comfortable when they are under the tent because they have the feeling of being enclosed, and we have to use other means of giving oxygen therapy by the nasal method, or other means. We find that some patients who are rational and who are possessed of all their faculties, nevertheless do not accommodate themselves to the oxygen tent. We find that very irrational and nervous patients, if they have the strength, are inclined to get out of bed over the sideboards when we have the boards in place. However, I never had any reason to believe that Mrs. Potter should be closed in with a sideboard. On Sunday, before she was transferred, there was considerable study of Mrs. Potter's case. We determined that room 437 would be a very good room in which to put her because there was one cubical (partition) up in that room and Mrs. Kearney had a very soothing influence on Mrs. Potter. The fact that a patient is critically ill does not suggest the advisability of a sideboard. We have many critically ill patients that we do not use sideboards on.

There are more nurses during the day shifts than during the night shifts. Student nurses are required to have experience both during the day and night. In the daytime there is executive work to do, and three meals are served. It doesn't take a very strong woman to climb over the sideboards if she is irrational. Mrs. Potter had particular strength in fighting the oxygen and, as I recall, it seems to me that they said she fought the sideboards and tried to get out of bed. At 5:30 A. M. Sunday morning, there is an entry in the record ("Exhibit A") that the "patient is still irrational," and that she was "moved back to 203," and that she was "sleeping for short intervals." At 8 o'clock in the morning there is an entry "patient out of bed." That would be Monday morning, and that would be the morning when we were determining whether it would be advantageous to move her to this other room. We moved her there because of her restlessness as we had other ill patients in the room. During the discussion of her case, we considered the use of bedboards, and at that time we felt they would not be advisable because of the type of individual. She was rather determined and would get out of bed and probably crawl over the sideboard. Mrs. Potter was a C. C. (charity) case and those cases are grouped in certain divisions.

Re-Direct Examination

Charity cases are taken care of in 4-B division whenever possible. I would say that a patient in the condition of Mrs. Potter, if she were inclined to get out of bed without boards, would also be inclined to get out of bed if boards were in place; in other words, boards would be no sufficient obstruction. Patients that become irrational and restless often times try to get out of bed, and it matters not whether there are boards or not, they get out of bed. It would be more dangerous if she got out of bed with the boards on than it would be with the boards off. There are also pay patients on 4-B division, and both charity cases and pay cases receive the same attention.

223 RHODA LARSON, a witness produced on behalf of the Defendant, testified as follows:

Direct Examination

I reside in Salt Lake City and graduated as a nurse from the L. D. S. Hospital in 1930. I worked at the hospital in 1934, 1935, and part of 1936, and came back in July or August, 1938, and I am still working there. Prior to that time I worked at the hospital in Lehi, and at other places, and became familiar with the practice of caring for the

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sick and injured. I have observed the cases in which sideboards are used in hospital beds, and have noticed how patients react and respond to that manner of treatment. I have seen cases when sideboards were used when the patient still refused to remain in bed and would get out. They would crawl over the board.

227 Since 1938, I have been the afternoon medical supervisor at the L. D. S. Hospital. I have the same position as Mrs. Mason, the previous witness. We have different shifts, however. I was working at the L. D. S. Hospital in February of this year. Each day, prior to Mrs. Mason's leaving the hospital, she would make a report to me. Before my duties were concluded, I would make a report to the night supervisor, the one succeeding me. This would be the daily routine. My divisions at the hospital were 4-C, 4-B, 3-A, 2-A, and the pediatric division, which is on 6-A. I first saw Mrs. Potter when she was admittaed to 2-A. Thereafter, I saw her daily except, possibly for one day. It would be my day off from work. I saw Mrs. Potter on Monday afternoon before her injury. There had been a marked improvement in her mental condition between the time of her admittance to the hospital and Monday afternoon. When Mrs. Potter came into the hospital, she was very restless and seemed to resent what was being done for her. On Monday afternoon, she seemed

perfectly rational and very well oriented, and seemed happy at being in the hospital. On the night of her admittance I saw the sideboards on the bed. Boards are sometimes put on when patients seem irrational and restless. When they are not irrational and not restless or unconscious, the boards are not put in place.

229 We have a great many patients who resent sideboards. They give them a shut-in feeling and they become more restless than without the boards. It is our purpose to relieve patients or to reduce the degree of restlessness. I observed Mrs. Potter on the afternoon of February 20. At that time I could see no reason for the use of sideboards. I left the hospital about midnight, and at no time prior to my departure did I feel there was any occasion for the use of sideboards. We had been much concerned about Mrs. Potter's condition, and I always looked in at her. On that occasion (Monday night) she and the other patient (Mrs. Kearney) seemed to be resting very quietly. They were the only patients in room 437. Mrs. Potter had a back rest and this was provided to make her breathing easier. She sat in bed at about a forty-five degree angle. Whenever I saw Mrs. Potter in the hospital she always had a back rest. That would be night and day. I have acted as a special nurse in hospital cases, and I am familiar with the practice followed by special nurses. It is impos-

sible for them to be with the patient constantly. They are required to leave the room and prepare medications, and do other things that are necessary for the patient. Likewise, the nurse has occasion to attend to her own needs. The hospital does not provide meals for the special nurses, but there are lunch stands near the hospital where they usually go. It is the practice for special nurses to leave their patients in order to attend to their own requirements.

232 On the afternoon of Monday, February 20, I had a conversation with Mrs. Potter's daughters—two of them. The conversation related to the continuance of the services of the special nurse. We were talking about their mother, and they asked me what I thought of her condition. I told them that I thought it was improved, and they asked me whether or not I felt it was necessary for them to continue with this special nurse. I told them that the treatment required by their mother could be taken care of by the floor nurses. They stated it was a strain on them to be paying out this money, and that if it was not necessary, they would rather have the nurse cancelled. So it was decided, there, that we would cancel the nurse that night, and I arranged for that matter. In this conversation, I never insisted upon releasing the nurse. My opinion was asked for and I merely gave it to the two daughters. A special nurse,

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of course, would tend to relieve the work of the floor nurses; it cuts down the work they are required to perform. For a patient in the condition Mrs. Potter was on Monday night, I would say there was no need of sideboards. It is my experience that if the patient is determined to get out of the hospital bed, sideboards constitute no obstruction. Mrs. Potter appeared to be entirely rational.

235

Cross-Examination

When I talked to the two daughters on Monday afternoon, Mrs. Potter appeared to be perfectly rational, and it was my opinion at that time that the continuation of the special nurse would not justify the expense involved. I would say that sometimes a special nurse is very bad for a patient; that is, the psychological effect on the patient is bad. It sometimes wears on the patient to have a special nurse at her bedside, all the time. In Mrs. Potter's case, I wouldn't say it was an advantage to have a special nurse. Patients, when they are irrational, need some attention. The floor nurses check their patients very closely and can usually observe signs of restlessness. In my division, I would imagine there would be about 150 to 175 patients and, of course, there would be that many beds. Some patients would be in private rooms and some would be in wards. Four would

be the greatest number in any one room. My shift terminated at the hospital at midnight on Monday, and I don't know of my own knowledge what was done that night after the accident. As I remember, the sideboards were put on Mrs. Kearney's bed the day before she died. She was afflicted with rheumatism. Mrs. Kearney had been an invalid for about fifteen years and it would be difficult for her to get out of bed. While patients are rational and not nervous, they don't like the looks of sideboards. They don't like the shut-in feeling. When patients are irrational they, of course, might object to almost anything. Mrs. Mason, the supervising nurse preceding me, made a report to me when I came on duty, Monday afternoon. The report would be partly in writing and partly oral. Those written reports are not saved; they are made daily just for our convenience and are not included in the hospital records. My report to my successor would concern the entire part of the hospital over which I had jurisdiction.

240 I tried to visit every patient, every day. However, it was sometimes impossible. If patients were critically ill, I would see them from two to four times during my visit. I am acquainted with Miss Duncombe, who acted as a special nurse. Usually, when I saw Miss Duncombe, she would be bathing the patient and working with her to get her settled for the night.

Re-Direct Examination

We generally have two nurses who come on duty at 2:30 in the afternoon and work until 11 at night. Throughout the day they work in broken or split shifts and help to cover the busy period. We usually have some six to eight nurses from 4 o'clock in the afternoon to 7, and about four nurses from 7 to 10. During the mealtime, there is a greater number of nurses. All patients do not require the same kind of treatment. Some are convalescing and others are desperately ill, and the latter require great attention. Some patients, of course, have whims and we have to cater to them. Human nature, it seems, doesn't change very much when they enter the hospital.

Re-Cross Examination

The treatment accorded the patients depends entirely upon what is the matter with them. A surgical case may need bandages, while a case of arthritis may not require dressings of any kind at all. We have two nurses on 4-B division from 11 o'clock at night until 7 in the morning. On that division we have between 40 and 45 beds. The number of patients on the division would be anywhere from twenty to thirty, and at times from thirty to forty. The minimum would be twenty and the maximum, forty.

246 LEONA FELIG, a witness produced on behalf of the Defendant, testified as follows:

I am a student nurse at the L. D. S. Hospital, and entered the institution in 1936. It requires three years for graduation. I will graduate in September of this year. I was on duty at the hospital on February 16, and thereafter during that month, and remember very distinctly the case of Mrs. Jean Potter. I was off duty a portion of Monday, but went on duty at 11 o'clock that night, and saw Mrs. Potter. I also saw her for about five minutes on Sunday. I remained on duty until 7 o'clock Tuesday morning. I attended to Mrs. Potter on Monday night. Mrs. Potter and Mrs. Kearney occupied the same room. Mrs. Potter was sitting at a pretty good angle; I would say between 45 and 60 degrees. She was upright but not straight.

251 When I came on duty, Monday night at 11 o'clock, the girls were not quite through with their work so I waited until 20 minutes to 12 to get my report, which usually takes about 20 to 25 minutes. I received my report from the girls on the preceding shift. After I received my report, which would be around 12 o'clock, I took my flashlight to make the rounds in all the rooms. It was around 12 o'clock when I first saw Mrs. Potter that night. Prior to seeing her, however, I had examined the

hospital chart and in that way became familiar with her case. So far as I was concerned, she was a new case as I had only seen her for a few minutes the day before.

254 The entries in red ink in the record ("Exhibit A") indicate the period from 7 o'clock at night until 7 o'clock in the morning, and those in black ink from 7 o'clock in the morning until 7 o'clock at night. I started to make my record, in red ink, at 7 o'clock on Monday night. Miss Brockbank, my assistant, would also make entries in
256 the record. She came on duty the same time that I did.

257 When I first went in to attend to Mrs. Kearney, I remained in the room for some little time. I had known her for quite a little while and had worked with her on a day shift. Knowing Mrs. Kearney's condition, I remained in the room while she was using the bed pan. At that time, Mrs. Potter was awake; she seemed very rational and was not at all restless. I made a note of that fact in the record ("Exhibit A"). The note reads "awake, not restless." This would be at 12:15 A. M. Tuesday morning. The next entry is at 12:20 A. M. It states that the patient was "talking". This meant that I heard two people conversing while I was in the room adjoining that occupied by the two patients. The room I was in would be 436, to

the East of 437. After I had attended to Mrs. Kearney and Mrs. Potter, I went into room 436. While there I couldn't hear what they were saying, but it was very loud. I immediately went into room 437. The light was off. When I entered the room, I put the flashlight on both patients. I saw Mrs. Potter sitting on the edge of her bed with her legs and feet dangling over the edge. She was next to the foot on the lower half of her bed; that would be on the East end of the bed. The bed breaks in the middle. She was facing me. That is, she was facing North, and was sitting on the edge of the bed with her hands down. It looked to me like she was getting ready to get off in that position. She was in an upright, sitting posture. She had left the back rest and was sitting on the lower part of the bed, which was level.

262-3 While I was trying to get to Mrs. Potter, she got off from the bed, but I broke the upper half of her fall; that is, before her shoulders reached the floor, I was there holding her. At the instant Mrs. Potter fell, Mrs. Kearney said: "I told her not to go to the bathroom. She said she was going to the bathroom." That statement was made at the instant I was picking Mrs. Potter up.

264 Later, I made the following entry in the record ("Exhibit A"): "Talking. Patient sitting on edge of bed with legs down reaching for the floor.

Fell as nurse entered the room. Complains of left hip paining. Helped back to bed. Crying and complaining of pain.''

265 When I visited Mrs. Potter at 12:20 A. M. on the morning of February 21 (Tuesday) there was nothing about her condition that indicated the advisability of using sideboards. The boards were always available for this purpose when needed. At times I have found that sideboards are detrimental. I have seen patients try to get out of bed when sideboards were used and I have tried to keep them in many times. If they are determined to get out, they will. At 12:15 A. M. would say that Mrs. Potter was very rational. I talked to her and she responded, and there was no appearance of being restless. There was nothing about her condition that made me feel she was apt to move around in the bed and possibly fall out.

267

Cross-Examination

It was my judgment that Mrs. Potter's bed would be about three and one-half feet from the floor. When the bed was tilted, it would be the entire half of the bed. When the foot was tilted, it would be the entire lower half of the bed. The lower half may be put into a triangular shape for your knees to rest on.

270

I looked at Mrs. Potter's chart when I went

on duty Monday night between 11 and 12 o'clock. I do not recall that I looked over her chart. The chart is left at the desk and after we visit the patient, we return to the desk and make the entries. This was done in the instant case. The entries respecting Mrs. Potter, to which I have heretofore referred, were made after calling Dr. Bourne at about 1:30 A. M. After the accident, no sideboards were put on Mrs. Kearney's bed while I was on duty. I put a sideboard on one side of Mrs Potter's bed. The other side was against the wall. If a patient wanted to, it would be easy to push the bed away from the wall.

275 JOHN BOURNE, a witness produced on behalf of the Defendant, testified as follows:

Direct Examination

I am a physician and surgeon and licensed to practice medicine in the State of Utah. I received my medical degree at the George Washington University, following which I came to the L. D. S. Hospital to serve an internship. I reported for duty in July, 1937, and have been in attendance at the hospital since that time. I recall receiving a patient by the name of Mrs. Jean Brown Potter, and, as an interne, made an examination of her. My findings are recorded in my own handwriting on the chart ("Exhibit A"). I have an independ-

ent recollection of her general condition. I was told by those who brought her to the hospital that she suffered a fainting spell, a sinking spell of some kind, a stroke, about three weeks before her entrance; that she had been seen by a doctor and put on digitalis and strychnine; that she was very rational in her mind but was forgetful. I examined the patient and found it was necessary for her comfort to sit up in bed, partially. Her complaint seemed to be with her breathing and heart. The heart had murmurs, but it seemed to be functioning very well. Her liver was slightly enlarged and there were some rales in her lungs showing partial congestion or decompensation of the heart. Rales are produced by moisture in the air spaces in the lungs, which produce a little bubbling sound. Her respirations were such as to be described by the term cheyne strokes, which means they have a period that they do not breathe for a portion of a minute, or nearly two or three minutes, and then they will begin to breathe slightly at first, and then the respiration finally becomes quite deep. From this point they taper off into this period of no respiration at all, and they cease breathing and lie as though dead. Then, they begin to breathe again. Generally, it might be described as a period of breathing and then a cessation of breathing for another period. This is what we call cheyne stokes respiration. Mrs. Potter had no fever or pneumonia.

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280 It is customary to make a prognosis following such an examination. My prognosis of Mrs. Potter was poor. I meant by that her chances for recovery were poor; the outlook in her case was unfavorable. This would be shortly after she entered the hospital. I thought her condition might be improved inasmuch as she was suffering from time to time from lack of food and water. I knew we could improve the state of her nutrition, which might improve her sense of well being, but her condition was, as it seemed to me, so serious that I doubted very much that she would ever recover.

281 *Cross-Examination*

The term prognosis is a prophecy.

282 Thereupon, LEONA FELIX, a witness heretofore produced on behalf of the Defendant, was recalled by Defendant and testified as follows:

Direct Examination

In my cross-examination, I testified that after the accident a sideboard was placed on the bed of Mrs. Potter; that is, a board was placed on the south side of the bed. After getting Mrs. Potter back in bed, following the accident, the bed was lowered somewhat so that she wasn't sitting quite so high. I mean by this the head of the bed was lowered. She was in a reclining position with both

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of her legs straight down in the bed. It was her left leg that was injured and her right leg would be the nearest one to the window. It was on that side we placed the board, thinking that if she was going to get out, she would be more apt to use her right leg and get out on that side.

284 After Mrs. Potter fell out of bed, she was extremely restless and moved a great deal. Her talk was incoherent at times. She was a great deal more restless after the accident than before, and for that reason we put on the sideboard. She was not restless at all before the accident.

284-285

Cross-Examination

When I say she was not restless at all before the accident, I mean that I didn't see her at any time that evening when she was restless. I don't know about her restlessness on prior occasions.

JOHN BOURNE, a witness produced on behalf of the Defendant, was recalled by Defendant and testified as follows:

286

Direct Examination

Some of the writing on the first page of the chart on record ("Exhibit A") was written by me. That which is in my handwriting is the part shown as the summary. I was in Mrs. Potter's

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room a short time after the accident, but was not there when the accident occurred.

The notation in the summary that Mrs. Potter "fell out of bed" was based on information given me by someone else.

287

Cross-Examination

The information that she broke her hip was gained from examination which I made of Mrs. Potter. The X-ray shows that the neck of the femur was broken.

288

MR. THURMAN: Defendant rests.

JUDGE LEWIS: Plaintiffs rest.

288-292 (Thereupon, the Defendant moved the Court to grant a directed verdict on the following grounds:

1. That there is a total want of evidence to show that the deceased fell out of bed;

2. That the evidence shows without dispute that the deceased herself got out of bed, and while in the act of so doing fell to the floor and sustained the injuries of which complaint is made;

3. That the evidence shows without dispute, and there being no evidence to the contrary, that there was no reasonable ground to believe, that there were no reasonable grounds for the defendant to believe—no, put it this way: there were no reasonable grounds to believe, on the part of those charged with caring for deceased in defendant's hospital, that the condition of deceased required or suggested the advisability of the use of sideboards;

4. That the evidence shows without dispute, there being no evidence to the contrary, that there were no reasonable grounds to believe, on the part of those charged with caring for the deceased in defendant's hospital, that the condition of the deceased required or suggested the advisability of deceased being guarded by a nurse, or otherwise, or at all;

5. That there is no evidence to show that the accident sustained by deceased would have been prevented or was likely to have been prevented had sideboards been placed to the side of defendant's bed;

6. That the evidence shows without dispute that the deceased herself got out of

bed, that her act was voluntary, and that even though sideboards had been in position or in place on the bed of the deceased, still the deceased was in a condition and able to get out of bed or to crawl over the sideboards and get out of bed;

7. That the evidence wholly fails to show that the injuries sustained by deceased were proximately caused by defendant's failure to maintain sideboards on defendant's bed or by defendant's failure to do for deceased that which defendant was required to do under the law;

8. That the evidence wholly fails to show that the death of deceased was proximately caused by defendant's failure to maintain sideboards on defendant's bed or by defendant's failure to do for deceased that which defendant was required to do under the law;

9. That the evidence shows without dispute that defendant, in caring for the deceased, used that degree of care usually and customarily exercised by hospitals in caring for the sick who are in the condition in which the evidence shows the deceased to have been;

10. That the evidence shows without dispute that for a number of hours before the accident the deceased was free from restlessness and that five minutes before the accident she was still free from restlessness; also that she was awake five minutes before the accident and was talking and was rational, and that there was nothing about the condition of the deceased which required the defendant, in the exercise of reasonable care, and in the exercise of that degree of care required of defendant by the law, to provide sideboards for the bed of the deceased;

11. That the evidence at this stage conclusively shows that the deceased entered the hospital on the night of February 16, 1939, in a very poor condition, and that her condition was such that in all probability she would not recover from the ailment with which she was suffering;

12. That the evidence affirmatively shows that the breaking of the femur, fracture of the femur of the deceased was not a contributing cause to the death of deceased. The evidence shows the deceased was in such condition that she would have died by reason of the ailment from which

she was suffering at the time of her admittance into the hospital on February 16, 1939;

13. That the evidence shows without dispute that the deceased, in her relationship to the defendant hospital, was a non-paying patient, that she was a charity case; also that the hospital was a charitable institution, and that the evidence wholly fails to show that the hospital, the defendant, was negligent or did not use reasonable care in the selection of its employees and servants who attended the deceased;

14. That the evidence shows the deceased was a non-paying patient, a charity patient, and that the hospital, the defendant, was a charitable institution and that the hospital under the circumstances was exempt from liability for the negligent acts of its employees, agents and servants who were called upon to care for and who did care for the deceased during her illness;

15. That the evidence shows without dispute that irrespective of the defendant's negligence in caring for deceased, if any negligence has been shown, the defendant, by reason of its status as a charitable insti-

tution and by reason of the relations of the deceased to the defendant hospital, that of a non-paying and charitable patient, the defendant would be exempt from liability for any of the negligent acts of its servants and employees of which complaint is made by the plaintiffs in this case.

THE COURT: The motion for a directed verdict is denied.

292 (Thereupon, "Exhibit 1" was offered in evidence, and, upon consent of the parties, was received in evidence by the Court.)

DEFENDANT'S REQUESTS FOR INSTRUCTIONS

31 *Defendant's Request No. 1.*

The Court instructs the jury to return a verdict against the plaintiffs and in favor of the defendant, no cause of action.

32 *Defendant's Request No. 2.*

You are instructed that sympathy should play no part in your deliberations. If you find for the plaintiff in this case, your verdict must be based upon the law and the evidence and should not be controlled or affected by a consideration of sym-

pathy for either party to this action, or by reason of bias to either party to this action. Likewise, you are not permitted to resort to guess, speculation or conjecture in arriving at your verdict, but you must base your verdict solely upon the law as the Court has given it to you and upon the facts as established by the evidence.

33

Defendant's Request No. 3.

If, after a careful, honest and impartial consideration of these instructions, and all of the evidence admitted in the case, any of your number should honestly and conscientiously differ as to the value, weight and effect to be given to the evidence, before a verdict would be rendered, then I instruct you that you may disagree. In other words, you are not called upon to surrender your honest convictions concerning the effect of the evidence in this case, or as to the verdict to be rendered, for the mere purpose of agreeing upon a verdict.

34

Defendant's Request No. 4.

The Court instructs you that in determining the liability or non-liability for the injuries sustained by deceased, you should not allow your judgment to be affected by reason of the sympathy or sorrow which you may experience because of such injuries.

Defendant's Request No. 5.

You are instructed that a hospital, in rendering hospitalization to the sick and injured, is not a warrantor that no injuries will result to the patient during the period of such hospitalization.

Defendant's Request No. 6.

If you find from a preponderance of the evidence, as that term is elsewhere defined in these instructions, that on February 21, 1939, the deceased, while a patient in defendant's hospital fell out of bed, receiving a fracture to the femur, which fracture is admitted in this case, but that in the care and treatment which defendant rendered to said deceased, defendant was not guilty of any carelessness or negligence, then your verdict should be against plaintiffs and in favor of defendant, no cause of action.

Defendant's Request No. 7.

The fact that the Court has instructed you on the measure of damages, should you find for the plaintiffs, is not to be taken as any intimation that the Court either believes or does not believe that plaintiffs are entitled to recover such damages. These instructions are given you to guide you in case you believe from the evidence that plaintiffs are entitled to recover, as it is the duty of the

Court to charge you fully upon all of the law in the case. But should you determine from the evidence that plaintiffs are not entitled to recover, then and in that event you are to disregard the instructions the Court has given you upon the measure of damages.

38 *Defendant's Request No. 8.*

The Court instructs the jury that while it was the duty of the defendant to exercise ordinary and reasonable care and caution to safeguard and prevent injury to deceased, yet the defendant was not required by law to be on its guard against the unusual, extraordinary or not-reasonably-to-be-expected occurrence; and if you find from the evidence in this case that it was not reasonably to be expected by the defendant that an occurrence such as the one which resulted in injury to the deceased would take place, then the defendant, under the law, is in no manner liable for said occurrence.

39 *Defendant's Request No. 9.*

You are instructed in this case that while it was the duty of the defendant to exercise ordinary and reasonable care and caution to safeguard and prevent injury to deceased, yet the defendant cannot be held liable for the damages complained of in this case merely because of the fact that it may now appear, after the happening

of the accident, that defendant, by keeping a constant guard over deceased or by using other means to keep deceased in bed, may have prevented the accident in which deceased received a fracture to her left femur.

40 *Defendant's Request No. 10.*

If you find from the evidence that the defendant's nurses and servants, upon finding that deceased's condition on the night of February 20, 1939, and up to the time of the accident at about the hour of 12:20 o'clock A. M., on February 21, 1939, had improved, reasonably believed that no sideboards were necessary in order properly to care for and safeguard the deceased, then you are instructed that defendant was not negligent in not placing sideboards on the bed of deceased.

41 *Defendant's Request No. 11.*

In the instruction bearing upon the question of damages, the Court has used the words "pecuniary value," and you are now instructed that those words mean value in money or value from a monetary standpoint.

42 *Defendant's Request No. 12.*

If you find from the evidence in this case that deceased's death was contributed to in whole or in

part from the fracture to her left femur, and that said fracture resulted from defendant's negligence, before you can assess damages against defendant because of the loss of society and companionship which plaintiffs have suffered by reason of the death of said deceased, you must also find that in said loss of society and companionship the plaintiffs or one or more of them have sustained a pecuniary or monetary loss.

43

Defendant's Request No. 13.

If you find from the evidence in this case that deceased's death was contributed to in whole or in part from the fracture to her left femur, and that said fracture resulted from defendant's negligence, and that the husband of deceased suffered a loss of services by reason of said death, before you can assess damages because of said loss of services, you must find that said loss of services represented a pecuniary or monetary loss to said husband.

44

Defendant's Request No. 14.

You are instructed that there is no evidence in this case that the deceased fell out of bed while a patient in defendant's hospital.

45

(Title of Court and Cause.)

INSTRUCTIONS TO THE JURY
MEMBERS OF THE JURY:

Instruction No. 1

The plaintiffs in their complaint allege and the defendant in its answer admits that defendant is a corporation organized and existing under the laws of Utah, with its principal place of business located at Salt Lake City, and is and at all times hereinafter mentioned was operating and conducting a hospital in Salt Lake City engaged in the treatment, nursing and care of the general public for pay.

Plaintiffs then allege that John Potter is the surviving husband of Jean Brown Potter, deceased, and one of her heirs; and that the other plaintiffs are surviving children and heirs of Jean Brown Potter, and that plaintiffs are the sole heirs of Jean Brown Potter, deceased. The defendant denies this allegation on the ground that it is without information sufficient to enable it to form a belief.

Plaintiffs then allege that on or about February 16, 1939, Jean Brown Potter, deceased, entered and was admitted as a patient in defendant's hospital and defendant then undertook to treat, nurse and care for her; that in operating its hospital defendant owed a duty to said deceased to exercise

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due care in her treatment, nursing and care. The allegations contained in this paragraph are admitted by defendant in its answer.

- 46 The plaintiffs then allege that on or about February 21, 1939, defendant, by its agents and servants, carelessly and negligently allowed deceased to fall from bed and to suffer a broken hip as a result thereof, which fall and injury was the direct and proximate cause of said Jean Brown Potter's death, which occurred on or about February 23, 1939; that the defendant was careless and negligent in that prior to February 21st and continuously after deceased's entrance into defendant's hospital, she was nervous and at times irrational, and due and reasonable care required that the bed in which she was kept should be provided with sideboards to prevent deceased from falling out of bed; that prior to February 21, 1939, defendant did so provide and maintain on said bed sideboards for the protection of said deceased, but that defendant on the night of February 21, 1939, did negligently and carelessly fail to provide for and place in position sideboards on said bed, and negligently and carelessly failed to guard said bed and said Jean Brown Potter, deceased, and that as a result of said negligence and carelessness the deceased fell out of bed, was injured and died, as above stated.

That said Jean Brown Potter was an attentive, affectionate and dutiful wife, capable and efficient to her husband, a plaintiff herein, and by reason of defendant's acts he has been deprived of the company, comfort and services of his wife; that deceased was a loving and affectionate mother to her children, also plaintiffs herein, and they have been deprived of her company and comfort; that plaintiffs have been forced to expend \$290.00 for burial and funeral expenses for the deceased and have suffered general damage in the sum of \$10,000.00. Wherefore they pray judgment against defendant in the sum of \$10,290.00.

47 The defendant, by way of answer, in addition to the admissions and denials heretofore set forth, admits that on or about February 21, 1939, said deceased sustained a fall, resulting in certain physical injuries, while she was a patient in defendant's hospital and that she died on or about February 23, 1939, and then denies each and every other allegation in plaintiff's complaint contained.

The defendant, therefore, prays that plaintiffs' complaint be dismissed.

48

Instruction No. 2

If you find from a preponderance of the evidence that the death of the deceased, Jean Brown Potter, was caused by the negligence of the de-

fendant hospital in failing to use reasonable care to guard said deceased from injury while she was a patient in said hospital, then you are instructed that your verdict should be in favor of plaintiffs.

49

Instruction No. 3

You are instructed that a hospital, in rendering hospitalization to the sick and injured, is not a warrantor that no injuries will result to the patient during the period of such hospitalization.

Instruction No. 4

The court instructs the jury that while it was the duty of the defendant to exercise ordinary and reasonable care and caution to safeguard and prevent injury to deceased, yet the defendant was not required by law to be on its guard against the unusual, extra-ordinary or not-reasonably-to-be-expected occurrence; and if you find from the evidence in this case that it was not reasonably to be expected by the defendant that an occurrence such as the one which resulted in injury to the deceased would take place, then the defendant, under the law, is in no manner liable for said occurrence.

50

Instruction No. 5

You are instructed in this case that while it was the duty of the defendant to exercise ordinary

and reasonable care and caution to safeguard and prevent injury to deceased, yet the defendant cannot be held liable for the damages complained of in this case merely because of the fact that it may now appear, after the happening of the accident, that defendant, by keeping a constant guard over deceased or by using other means to keep deceased in bed, may have prevented the accident in which deceased received a fracture of her left femur.

Instruction No. 6

If you find from the evidence that the defendant's nurses and servants, upon finding that deceased's condition on the night of February 20, 1939, and up to the time of the accident at about the hour of 12:20 a. m., on February 21, 1939, had improved, reasonably believed that no sideboards were necessary in order properly to care for and safeguard the deceased, then you are instructed that defendant was not negligent in not placing sideboards on the bed of deceased.

Instruction No. 7

If you find from the evidence in this case that deceased's death was contributed to in whole or in part from the fracture of her left femur, and that said fracture resulted from defendant's negligence, before you can assess damages against defendant because of the loss of society and com-

panionship which plaintiffs have suffered by reason of the death of said deceased, you must also find that in said loss of society and companionship the plaintiffs or one or more of them have sustained a pecuniary or monetary loss.

Instruction No. 8

52 You are instructed that negligence is the failure to do what a reasonably prudent person would ordinarily have done under the circumstances of the situation, or doing what such person under such existing circumstances would not have done. The essence of the fault may lie in acting or omitting to act. The duty is dictated and measured by the exigencies of the occasion.

Ordinary care implies the exercise of reasonable diligence, and implies such watchfulness, caution and foresight as, under all the circumstances of the particular case, would be exercised by a reasonably careful, prudent person.

By proximate cause, you are instructed, is meant that cause which in a natural and continuous sequence, unbroken by any new cause, produced the injury, and without which the injury would not have occurred.

Instruction No. 9

53 The court instructs the jury that if you be-

lieve from a preponderance of the evidence that the plaintiffs are entitled to recover, in estimating the damage the jury have the right to consider the amount, if any, incurred by the plaintiffs, or any of them, for funeral and burial expenses by reason of the death of the deceased; also the pecuniary value, if any, of the loss of the society and companionship of the deceased to the plaintiffs or any of them, and the pecuniary value, if any, to the husband of the loss of the services of the deceased to him; and when considering all of the evidence and the instructions given you by the court, you should render such a verdict as under all the circumstances of the case you find to be just.

Instruction No. 10

- 54 In the instruction bearing upon the question of damages, the Court has used the words "pecuniary value," and you are now instructed that those words mean value in money or value from a monetary standpoint.

Instruction No. 11

The fact that the court has instructed you on the measure of damages, should you find for the plaintiffs, is not to be taken as any intimation that the court either believes or does not believe that plaintiffs are entitled to recover such damages. These instructions are given you to guide you in

case you believe from the evidence that plaintiffs are entitled to recover, as it is the duty of the court to charge you fully upon all of the law in the case. But should you determine from the evidence that plaintiffs are not entitled to recover, then and in that event you are to disregard the instructions the court has given you upon the measure of damages.

Instruction No. 12

- 55 You are instructed that sympathy should play no part in your deliberations. If you find for the plaintiffs in this case, your verdict must be based upon the law and the evidence and should not be controlled or affected by a consideration of sympathy for either party to this action, or by reason of bias to either party to this action. Likewise, you are not permitted to resort to guess, speculation or conjecture, in arriving at your verdict, but you must base your verdict solely upon the law as the court has given it to you and upon the facts as established by the evidence.

Instruction No. 13

- 55 If, after a careful, honest and impartial consideration of these instructions, and all of the evidence admitted in the case, any of your number should honestly and conscientiously differ as to the value, weight and effect to be given to the evi-

dence before a verdict would be rendered, then I instruct you that you may disagree. In other words, you are not called upon to surrender your honest convictions concerning the effect of the evidence in this case, or as to the verdict to be rendered, for the mere purpose of agreeing upon a verdict.

Instruction No. 14

56 By a preponderance of the evidence is meant the greater weight of the evidence, that which is the more convincing as to its truth. It is not necessarily determined by the number of witnesses for or against a proposition, although, all things being equal, it may be so determined.

If you find a conflict in the evidence you should reconcile it, if you can, upon any reasonable theory; and if you cannot do so, then you must determine what you do believe.

You are the exclusive judges of the facts submitted to you, and of the creditability of the witnesses. In judging of their creditability you have the right to take into consideration their deportment upon the witness stand, their interest in the result of the suit, the reasonableness of their statements, their apparent frankness or candor or the want of it, their opportunities to know and understand, and their capacity to remember.

You have the right to consider any fact or circumstance in evidence which, in your judgment, affects the creditability of any witness.

You should weigh the evidence carefully and consider all of it together. You should not pick out any particular fact in evidence or any particular statement of any witness and give it undue weight. You should give only such weight to inferences from the facts proven as in fairness you think they are entitled to.

You should consider all the evidence impartially, fairly and without prejudice of any kind, and from such consideration, in connection with the instructions given you by the court, you should reach such a verdict as will do justice between the parties.

You should not consider any testimony offered but not admitted, nor any evidence stricken out by the court, but only such evidence as has been admitted in the case.

If you believe that any witness on either side of this case has wilfully testified falsely on any material matter, then you have the right to disregard the entire testimony of such witness, unless his testimony is corroborated by other credible evidence.

When you retire to consider your verdict you will select one of your members as foreman. Your verdict must be in writing, signed by your foreman, and when found must be returned by you into court. A concurrence of at least six members of the jury is necessary to your verdict, and six jurors thus concurring may find a verdict.

P. C. EVANS

Judge

Given June 15, 1939.

293 Comes now the Derfendant and excepts to the instructions of the Court and to the refusal of the Court to give certain requests, as follows:

The defendant excepts to the refusal of the court to give its request No. 1.

The defendant excepts to the refusal of the court to give its request No. 4.

The defendant excepts to the refusal of the court to charge the jury in accordance with defendant's request No. 6.

The defendant excepts to the refusal of the court to charge the jury in accordance with the defendant's request No. 13.

The defendant excepts to the refusal of the court to charge the jury in accordance with the defendant's request No. 14.

Now, as to the charge itself, the defendant excepts to Instruction No. 2, and to the whole thereof; also to that portion of instruction No. 2 reading, as follows: "in failing to use reasonable care to guard said deceased from injury."

The defendant also excepts to that portion of Instruction No. 2, reading as follows: "reasonable care."

The defendant likewise excepts to Instruction No. 9, and to the whole thereof; also to that portion of Instruction No. 9, reading as follows: "also the pecuniary value, if any, of the loss of the society and companionship of the deceased to the plaintiffs or any of them"; also to that portion of Instruction No. 9, reading as follows: "and the pecuniary value, if any, to the husband of the loss of the services of the deceased to him."

296 That thereafter, to-wit, on June 15, 1939, the jury returned a verdict in favor of the plaintiffs and against the defendant, and assessed plain-

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tiff's damages in the amount of \$1,000.00, and that thereupon, and on said day, judgment in said sum of \$1,000.00 was entered upon said verdict.

61 (Title of Court and Cause)

NOTICE OF MOTION FOR A NEW TRIAL

To the above named plaintiffs, and to their attorneys, Lewis and Lewis:

You and each of you will please take notice that the defendant in the above entitled cause intends to move the Court to set aside the verdict of the jury heretofore rendered, and to grant a new trial in the above entitled cause, upon the following grounds, to-wit:

1. Irregularity in the proceedings of the Court and of the jury and of the adverse party, and in the orders of the court and abuse of discretion, by which the defendant was prevented from having a fair trial.

2. Misconduct of the jury.

3. Accident and surprise, which ordinary prudence could not have guarded against.

4. Newly discovered evidence, material for

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the defendant, which it could not, with reasonable diligence, have discovered and produced at the trial.

5. Excessive damages, appearing to have been given under the influence of passion or prejudice.

6. Insufficiency of the evidence to justify the verdict, and that said verdict is against law.

62 7. Errors in law occurring at the trial and excepted to by the defendant.

Said motion will be made, as far as the grounds numbered five, six and seven are concerned, upon the minutes, files and records of the Court, and as to grounds, one, two three and four, upon affidavits hereafter to be served upon you.

IRVINE, SKEEN & THURMAN and
MERRILL C. FAUX

Attorneys for Defendant.

Served and Filed June 19, 1939.

64 That thereafter, and on July 1, 1939, said Motion for a new trial came on for hearing, and, at the conclusion of the arguments on said motion, the same was taken under advisement; and

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65 that thereafter, and on August 11, 1939, said motion was by the court denied.

66 That thereafter, and on September 7, 1939, plaintiff served upon defendant, and filed in said cause, notice of the overruling of said motion for a new trial.

67-8 That thereafter, and on September 18, 1939, the Court made and entered an order, granting defendant to and including November 1, 1939, within which to prepare and serve its Bill of Exceptions in said cause.

297 That thereafter, and on October 24, 1939, de-
298 fendant served its Bill of Exceptions on plain-
tiffs, and on October 30, 1939, plaintiffs and de-
fendants signed a stipulation, stipulating that
said Bill of Exceptions might be settled, allowed
and signed as defendants' Bill of Exceptions in
said cause, and that on November 2, 1939, the
299 Honorable P. C. Evans, Judge of the District
Court of the Third Judicial District for the State
of Utah, in and for Salt Lake County, signed a
certificate, allowing and settling said Bill of Ex-
ceptions, and thereupon said Bill of Exceptions
was filed in said cause.

NOTICE OF APPEAL

To the plaintiffs above named, and to their attorneys, Lewis and Lewis:

You and each of you will please take notice that the defendant hereby appeals to the Supreme Court of the State of Utah from the judgment of the District Court of the Third Judicial District of the State of Utah in and for Salt Lake County, State of Utah, and from the whole thereof, made and entered in said Court in favor of plaintiffs and against defendant on the verdict of the jury empaneled in said cause, which verdict was rendered and filed in said Court on June 15, 1939, and which judgment thereafter became final by the overruling by said Court on August 11, 1939, of defendant's Motion for a New Trial.

Dated November 7, 1939.

MERRILL C. FAUX and
IRVINE, SKEEN, THURMAN & MINER
Attorneys for Defendant.

Served and filed November 7, 1939.

(Title of Court and Cause.)

ASSIGNMENTS OF ERROR

Comes now the defendant and appellant and

sets forth the following Assignments of Error committed by the lower court, upon which defendant and appellant relies for reversal of the judgment:

I.

That the Court erred in overruling the objection of defendant to the following question, propounded by plaintiffs to the witness, Jennie I. Potter, on the ground that the question was incompetent and immaterial:

98 “Q. Now, on that night, do you know whether or not there was a nurse, special nurse, designated to attend your mother?”

II.

That the Court erred in overruling the objection of defendant to the following question, propounded by plaintiffs to the witness, Jennie I. Potter, on the ground that the question was incompetent, irrelevant and immaterial:

98 “Q. Did you at a later time employ a special nurse?”

III.

That the Court erred in overruling the ob-

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jection of defendant to the following question, propounded by plaintiffs to the witness, Jennie I. Potter, on the ground that the question was incompetent, irrelevant and immaterial:

100 “Q. Now, you say you employed a special nurse. How did you do that?”

IV.

That the Court erred in overruling the objection of defendant to the following question, propounded by plaintiffs to the witness, Jennie I. Potter, wherein the witness was asked to state a conversation heard by her between Dr. Gill Richards and Dr. Llewellyn, on the ground that the question was incompetent, immaterial and irrelevant, and called for hearsay. The question was:

110 “Q. State the conversation.”

V.

That the court erred in denying defendants' motion to strike the following answer, made by the witness, Jennie I. Potter, to a question propounded to the witness by plaintiffs in which she was asked whether or not they (Doctors Richards and Llewellyn) said anything about injuries to the witness' mother, on the ground of irrelevancy, immateriality and hearsay:

111

“A. Yes, they told us about a fractured hip from falling out of bed, and they said they couldn’t do anything.”

VI.

That the Court erred in overruling the objection of defendant to the following question, propounded by plaintiffs to the witness, Jennie I. Potter, on the ground that the question was incompetent, irrelevant and immaterial:

113

“Q. What was the relationship between your father and mother, so far as being affectionate to each other?”

VII.

That the Court erred in overruling the objection of the defendant to the following question, propounded by plaintiffs to the witness, Jennie I. Potter, the question having to do with the relationship between the witness’ father and mother, on the ground that it was incompetent, irrelevant and immaterial:

113

“Q. And as to companionship?”

VIII.

That the Court erred in overruling the objection of defendant to the following questions,

propounded by plaintiffs to the witness, Jennie I. Potter, on the grounds that the questions were incompetent, irrelevant and immaterial:

113 “Q. And what had been the conduct and attitude of your mother toward her children?”

“Q. Throughout her life and continuing up until the time of her death?”

IX.

The Court erred in denying the defendant's motion to strike the following answer given by the witness, Jennie I. Potter, to the questions propounded by plaintiff as to the conduct and attitude of the witness' mother toward her children throughout the mother's life and continuing up until the time of her death, on the ground of incompetency, irrelevancy and immateriality:

114 “A. Well, she was the grandest mother in the world, I think, and she had always been just grand to us. She has worked with us at all times and helped us in everything we have had to do and stood by us in everything we have gone through.”

X.

That the Court erred in overruling the objec-

tion of the defendant to the following question, propounded by plaintiffs to the witness, Jennie I. Potter, on the ground that the question was immaterial and not within the pleadings:

115 “Q. What, if anything, did you do by way of special nurse after the injuries to your mother?”

XI.

That the Court erred in overruling the objection of the defendant to the following question, propounded by plaintiffs to the witness, Jennie I. Potter, on the ground that the question was immaterial and not within the pleadings:

115 “Q. Was there anything paid for burial clothing?”

XII.

186 That the Court erred in denying defendant's motion for a non suit.

XIII.

292 That the Court erred in denying defendant's motion for a directed verdict.

XIV.

48-294 That the Court erred in its instructions to the

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jury in giving Instruction No. 2, to which the defendant excepted.

XV.

48-294 That the Court erred in its instructions to the jury in giving that portion of Instruction No. 2, reading as follows: "in failing to use reasonable care to guard said deceased from injury," to which defendant excepted.

XVI.

48-294 That the Court erred in its instructions to the jury in giving that portion of Instruction No. 2, reading as follows: "reasonable care," to which defendant excepted.

XVII.

53-294 That the Court erred in its instructions to the jury in giving Instruction No. 9, to which defendant excepted.

XVIII.

53-294 That the Court erred in its instructions to the jury in giving that portion of Instruction No. 9, reading as follows: "also the pecuniary value, if any, of the loss of the society and companionship of the deceased to the plaintiffs or any of them," to which defendant excepted.

XIX.

53-294 That the Court erred in its instructions to the jury in giving that portion of Instruction No. 9, reading as follows: "and the pecuniary value, if any, to the husband of the loss of services of the deceased to him," to which defendant excepted.

XX.

36-294 That the Court erred in refusing to give defendant's request No. 6, to which the defendant excepted.

XXI.

43-294 That the Court erred in refusing to give defendant's request No. 13, to which the defendant excepted.

XXII.

44-294 That the Court erred in refusing to give defendant's request No. 14, to which the defendant excepted.

MERRILL C. FAUX and
IRVINE, SKEEN, THURMAN & MINER,
Attorneys for Defendant and Appellant.

Served January 5, 1940.